U.C. Berkeley War Crimes Studies Center
Sierra Leone Trial Monitoring Program

SPECIAL REPORT ON RULE 98 PLEADINGS IN THE *PROSECUTOR V. CHARLES TAYLOR*: DEFENSE MOTION FOR ACQUITTAL ON BASIS OF INSUFFICIENT EVIDENCE

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OVERVIEW

April 2009 marked the halfway point in the case of *Prosecutor v. Charles Taylor* at the Special Court for Sierra Leone (SCSL). Pursuant to Rule 98 of the SCSL Rules of Procedure and Evidence, Trial Chamber II heard oral submissions from the parties on a motion for acquittal brought by Counsel for the Accused. The Defense is entitled to bring this motion at the close of the Prosecution's case-in-chief. The premise underlying a Rule 98 motion is that the Prosecution has failed to present evidence sufficient to support a guilty verdict for one or more of the alleged crimes in the indictment. A successful Rule 98 motion may, in theory, result in a total acquittal for the accused before the Defense opens its case. Alternatively, where the Court finds some counts supported by evidence, and others unsupported, a Rule 98 motion can help the Defense narrow down the scope of the charges it must answer. Thus, Rule 98 provides the Court with a useful tool by which it can shorten the length of a trial, as warranted by the evidence presented.

In the *Taylor* case, the Defense argued that the Prosecution failed to present evidence sufficient to support a conviction on all counts. Consistent with statements the Defense has made since the beginning of trial, the Accused did not contest the veracity of the crime-base evidence. Instead, the Defense argued almost exclusively that the Prosecution had failed to adduce adequate linkage evidence tying Mr. Taylor to the crimes committed in Sierra Leone. In oral arguments, Counsel for the Defense moved systematically through each of the modes of liability charged in the indictment, in an attempt to show why the Prosecution evidence was insufficient to support a conviction under any of these liability theories. The Defense paid particularly close attention to contesting the most complex and far-reaching theory of liability—joint criminal enterprise (JCE).

On rebuttal, the Prosecution sought dismissal of the motion in its entirety, countering that it had led evidence capable of supporting a conviction on each count in the indictment. The Prosecution maintained that Rule 98 only required the Court to find evidence capable of supporting a conviction under *one* mode of liability for each count it upheld. To this end, senior trial attorney, Brenda Hollis, took special care recalling linkage evidence the Prosecution claimed could prove Taylor's guilt on all counts under the JCE mode of liability. However, she also presented evidence on other contested modes of liability—aiding and abetting, planning, instigating, ordering, and command responsibility—in order to counter Defense arguments point-by-point.

After hearing arguments from both sides, the Court deliberated for one week and then dismissed the Defense motion in its entirety.[1] Despite the detailed and comprehensive nature of the parties' submissions, the Court restricted the scope of its ruling to a single mode of liability. In a unanimous decision, delivered orally from the bench, the Judges of Trial Chamber II held that the Prosecution had led sufficient evidence, under a JCE theory of liability, to support conviction on all counts of the indictment. The Court declined to address the strength of the Prosecution evidence under any other mode of liability. With this perfunctory approach to the Rule 98 process, Trial Chamber II missed an opportunity to narrow the scope of the case the Defense will have to answer during its case in chief. If the Trial Chamber had taken it upon itself to evaluate the sufficiency of evidence under every mode of liability contested by the Defense, it might have shortened the second half of the trial considerably by narrowing the grounds for conviction, or at least clarifying the applicable legal standards used to evaluate the evidence under each mode of liability. Instead the Court has seemingly guaranteed that the Defense case will include a long and arguably unnecessary presentation of evidence addressing multiple modes of liability for each of the eleven counts charged in the indictment.

To illustrate the scope of contested evidence on which the Trial Chamber declined rule, this report offers a detailed description of the arguments the Defense and Prosecution presented during the motion for acquittal. This summary is prefaced, however, by an historical overview of the Rule 98 standard as it evolved over the life of the Special Court. *Taylor* is the last remaining case before an SCSL trial chamber, and this Defense motion for acquittal was the fourth and final Rule 98 motion heard by the Court. Remarkably, despite the relatively small size and short institutional life span of the SCSL, each of the four motions for acquittal has been

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[1] The Court went into its annual spring recess the day after the Prosecution presented its arguments. The Court resumed on April 27, 2009, and rendered its decision a week later on May 4, 2009. The Court noted that it required a decision from the Appeals Chamber on an outstanding motion regarding the pleading of JCE before it could come to a decision on the Rule 98 motion. This Appeals Chamber decision was filed on May 1, 2009. *See Prosecutor v. Taylor*, Case No. SCSL-03-01-T-775, Decision on "Defence notice of appeal and submissions regarding the majority decision concerning the pleading of JCE in the second amended indictment," (May 1, 2009).

procedurally and substantively distinct from the others. This is due in part to the fact that the Rules Committee has altered the mechanics of Rule 98 by amendment several times since 2002 to make the process more efficient. There have also been substantive interpretive differences between the judges of the two trial chambers, producing a somewhat disjointed jurisprudence governing motions for acquittal at the Special Court. In light of the efficiency rationale underlying the original Rule 98 and its subsequent amendments, it bears consideration whether, in practice, the Rule has been effectively used at the Special Court.

The report is divided into the following sections:

DEVELOPING THE RULE 98 STANDARD AT THE SPECIAL COURT
- Application of Rule 98 in the CDF and AFRC Cases: Incongruent Standards
- Rule 98 in the RUF Case: New Procedural Limitations

SUBMISSIONS IN THE TAYLOR CASE
- Standard of Review
- Crime Locations
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  - *Planning*
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DECISION OF THE COURT

CONCLUSION

DEVELOPING THE RULE 98 STANDARD AT THE SPECIAL COURT

Motions for acquittal on the basis of insufficient evidence are common to all international criminal tribunals. Acquittal under Rule 98 is almost unheard of in practice, however. At the ICTY, no trial chamber has completely acquitted an accused of all counts, although in a few cases individual counts have been dismissed after the Prosecution rests its case-in-chief.[2] At the SCSL, there have been no acquittals on the basis of Rule 98.

Rule 98 evolved over time at the SCSL, before taking the form applied in the *Taylor* case. Originally appearing in the 2002 Rules of Procedure and Evidence, the rule was amended three times in judicial plenary sessions (in 2003, 2005, and again in 2006) before it took its present form. The current rule, as applied in *Taylor,* states:

> If, after the close of the case for the prosecution, there is no evidence capable of supporting a conviction on one or more counts of the indictment, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgment of acquittal on those counts.[3]

In the *Taylor* case, while the parties agreed on Trial Chamber II's application of the 2005 rule in the AFRC case, they argued over the standard for reviewing evidence credibility. Additionally, the *Taylor* trial was the first trial at the SCSL to have completely oral submissions.[4] This report will describe the evolving standard of Rule 98 at the SCSL, before turning to a discussion of how the rule was argued and applied in the *Taylor* case.

The most significant changes to the rule involved attempts to clarify the standard by which the Trial Chamber should judge the Prosecution's evidence.[5] The original 2002 version of Rule 98

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[2] INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, ICTY MANUAL ON DEVELOPED PRACTICES 121 (United Nations Interregional Crime and Justice Research 2009). The ICTY dropped individual counts in the *Delalić*, *Naletelić and Martinović*, and *Orić* cases. *Id.*

[3] Special Court for Sierra Leone, Rules of Procedure and Evidence [hereinafter Rules], Rule 98.

[4] Although the RUF trial heard oral submissions pursuant to the current form of Rule 98, the Court also required the parties to submit "skeleton" briefs outlining their arguments. This is discussed in more detail below.

[5] An interesting consequence of the evolution of Rule 98 at the SCSL is the gradual exclusion of the Court's ability to raise the issue of acquittal under its own initiative, or *proprio motu*. The original 2002 rule allowed for this ability, mandating the court to enter an acquittal decision if the evidence presented by the Prosecution was insufficient to sustain a conviction on one or more counts. Rules, Rule 98, (2002). Although the 2003 rule also required the Trial Chamber to enter a decision of acquittal if the evidence was insufficient, it did not specifically mention the ability, or requirement, to raise the issue *proprio motu*. Rules, Rule 98, (2003). The 2005 version of Rule 98 is similarly silent on this issue. Rules, Rule 98, (2005). Although it has not been argued at the SCSL and

followed an "insufficient to sustain a conviction" standard for review.[6] In 2003, the SCSL amended Rule 98 and altered the standard to require a finding that "no reasonable Tribunal of fact could be satisfied beyond a reasonable doubt of the accused's guilt." This clarified and narrowed potential interpretations of "insufficient," but could have resulted in an overly rigorous test by requiring an analysis of evidence on the "beyond a reasonable doubt" standard at the Rule 98 stage.[7]

In 2005, before being applied in any case at the Special Court, Rule 98 was amended again. The 2005 rule once more changed the standard for evaluating the Prosecution's evidence, providing that an acquittal must be entered if "there is no evidence capable of supporting a conviction."[8] Under this version, the rule did not include an interpretive guide as to how the court should determine what was considered "capable" evidence, as it had in the 2003 version. Rather, it left it up to the Trial Chamber to interpret how to apply the Rule 98 standard. It is this version of the rule that was applied in the first two trials at the Special Court to reach the end of the Prosecution's evidence—the CDF and AFRC cases.

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will pass without a determination on the matter, the new 2006 rule seems to limit the Trial Chamber's power to rule on the capability of evidence to support a conviction under its own initiative. The 2006 rule states that this decision can only come after hearing oral submissions; the *proprio motu* provision of earlier versions has disappeared completely. Rules, Rule 98, (2006). In its Position Paper, the Prosecution in the RUF case acknowledged that the Trial Chamber was open to raise the issue of sufficiency of evidence *proprio motu*, arguing that "in such cases the Prosecution is entitled to be informed by the Trial Chamber of the specific issues that concern the Trial Chamber, so that the Prosecution can address those specific issues." *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Prosecution Position Paper on Implementing Modalities for Rule 98, ¶ 18 (July 11, 2006) (citing *Prosecutor v. Jelisić*, Case No. IT-95-10, Judgement, ¶ 27 (July 5, 2001)). However, the OTP also argued specifically that "[t]he title of the Rule, 'Motion for Judgement of Acquittal', makes clear that the Rule 98 procedure commences upon a party bringing a motion for Judgement of acquittal," citing ICTY jurisprudence on the matter. *Id*. at ¶ 12. Allowing or requiring the Court to raise the sufficiency of evidence *proprio motu* gives the Court the opportunity to actively manage the length and scope of the trial should the Defense not raise the issue by motion.

[6] While the current incarnation of the rule is similar to the Rule 98*bis* standard applied at the ICTY, the original Rule 98 at the Special Court was actually based on the ICTR Rules, under which the court initially operated in 2002, until the first judge's plenary session. The original 2002 rule reads: "If after the close of the case for the Prosecution the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused or *proprio motu*, shall order the entry of a Judgement of acquittal in respect of those counts." Rules, Rule 98 (2002).

[7] The full 2003 amended rule reads: "If after the close of the case for the Prosecution, the evidence is such that no reasonable Tribunal of fact could be satisfied beyond a reasonable doubt of the accused's guilt on one or more counts of the indictment, the Trial Chamber shall enter a judgement of acquittal on those counts." Rules, Rule 98 (2003). The interpretation of this standard, although it was ultimately removed from the language of the rule before it was applied at the SCSL, was at issue in both the CDF and AFRC cases, and was decided differently in each of those cases. By including the phrase "beyond a reasonable doubt," the 2003 Rule ran the risk that the Trial Chamber would apply the standard for evaluating the Prosecution's case that should only be applied at the end of the trial, when all evidence has been adduced and its credibility evaluated by the Court. Such determinations at the Rule 98 stage are premature and could be prejudicial to the Prosecution. See discussion of the CDF and AFRC cases, below.

[8] The 2005 amended rule reads: "If after the close of the case for the Prosecution, there is no evidence capable of supporting a conviction on one or more of the counts of the indictment, the Trial Chamber shall enter a Judgement of acquittal on those counts." Rules, Rule 98 (2005).

APPLICATION OF RULE 98 IN THE CDF AND AFRC CASES: INCONGRUENT STANDARDS

Trial Chamber I and II diverged in their interpretation of Rule 98 in the CDF and AFRC cases.[9] Trial Chamber II is hearing the *Taylor* case, and using its own past interpretation of Rule 98 from the AFRC case. Accordingly, The trial Chamber's rationale in deciding the AFRC motions for acquittal is illustrative when examining the *Taylor* Rule 98 proceedings.

The CDF case was the first case in which Rule 98 was applied at the SCSL. Trial Chamber I issued a decision in October 2005 officially defining Rule 98 as the legal standard by which it should decide a Motion for Judgment of Acquittal.[10] The Court interpreted the rule narrowly. It noted that Rule 98 does not provide for a determination of the guilt or innocence of the accused, but instead sets the standard for evaluating whether the Prosecution's evidence at the close of its case is capable of supporting a conviction.[11] Completely abandoning the language of the 2003 rule, the Trial Chamber held that the Prosecution's evidence need not attain the threshold of "proof beyond a reasonable doubt" under a Rule 98 determination.[12] Rather, the Court defined the standard in the same language as appears in the rule—"capable"—noting that it was not appropriate to delve into the "proof beyond a reasonable doubt" standard at this stage of a case.[13] Providing some clarification on how it would interpret this rule, Trial Chamber I emphasized that the standard was "not whether the evidence is such as 'should' support a conviction, but rather, such as 'could' support a conviction."[14]

In the AFRC case, Trial Chamber II articulated a thorough interpretation of Rule 98, which it has adopted in the *Taylor* case. Reverting to the 2003 language, it held that the object of inquiry under Rule 98 was to determine whether the Prosecution's evidence could not possibly sustain a conviction beyond a reasonable doubt.[15] This reasoning highlights a different interpretation of the "proof beyond reasonable doubt" language related to Rule 98. It shows that although it may not be appropriate to engage in that level of analysis at the Rule 98 stage, as Trial Chamber I

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[9] Decisions from other Trial Chambers are not binding at the SCSL, but are merely persuasive, allowing for distinct applications of the same rule.
[10] *Prosecutor v. Norman et al.*, Case No. SCSL-04-14, Decision on Motions for Judgement of Acquittal Pursuant to Rule 98, ¶ 34 (Oct. 21, 2005).
[11] *Id.*
[12] *Id.* at ¶ 35.
[13] *Id.* at ¶¶ 34, 37.
[14] *Id.* (citing *Prosecutor v. Strugar et al.*, Case No. IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 *bis,* ¶ 11 (June 21, 2004)).
[15] *Prosecutor v. Brima et al.*, Case No. SCSL-05-16-T, Decision on Defense Motions for Judgement of Acquittal Pursuant to Rule 98 (Rule 98 Decision), ¶ 11 (Mar. 31 2006).

stated in the CDF case, that standard of proof can ultimately inform the Court in determining whether evidence is capable of supporting a conviction.

Trial Chamber II relied solely on ICTY and ICTR jurisprudence in arriving at this holding; it neither cited nor mentioned the holding in the CDF case with regard to the Rule 98 standard. The Court cited a passage from the ICTY *Jelisić Appeal Judgment* to illustrate its holding:[16]

> The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt.[17]

To clarify how the standard should be applied, the Court held that Rule 98 did not provide for consideration of the reliability or credibility of the Prosecution's evidence.[18] "If one possible view of the facts might support a conviction, then the Trial Chamber cannot enter a judgment of acquittal," the Court held.[19] Furthermore, the Court held that it must regard the Prosecution evidence as true, applying the test articulated in the ICTR *Bagasora* case.[20] This test provides that a Court can exclude evidence that is obviously incredible or unreliable; but that it should not engage in nuanced assessments of credibility or reliability at the Rule 98 stage.[21]

In applying this test, Trial Chamber II took a markedly different approach than Trial Chamber I (and one that appears to be unsupported by previous jurisprudence of the ad hoc tribunals). For the purpose of the AFRC motion, Trial Chamber II examined the evidence in relation to the counts on the whole, rather than examining whether each paragraph of the indictment was

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[16] *Prosecutor v. Orić*, Case No. IT-03-68, Trial Transcript, 8 June 2005, Pages 3-4 (lines 12-25; 1-6).
[17] *Prosecutor v. Jelisić*, Judgement, ¶ 37.
[18] *Brima et al.*, Rule 98 Decision, ¶ 8.
[19] *Prosecutor v. Jelisić*, Judgement, ¶ 37.
[20] *Brima et al.*, Rule 98 Decision, ¶ 11.
[21] *Id*.

supported.[22] By contrast, Trial Chamber I evaluated evidence in the CDF motion for acquittal on the basis of individual paragraphs in each count of the indictment.[23] Trial Chamber II did not provide any citations of a similar approach by other Courts in this regard. In fact, the approach appears to be out of step with the ICTY holding in *Prosecutor v. Naletilić*, that the Rule 98*bis* standard interpreted in the *Jelisić* Appeals Judgment allows judgment of acquittal with regard to a "particular factual event contained in a numbered paragraph supporting an offense charged in the Indictment."[24] In that case, the ICTY Trial Chamber paid particular attention to specific counts in the Indictment. The *Naletilić* Court further held that an acquittal on a numbered paragraph does not necessarily "affect the integrity of the count."[25]

Trial Chamber II's application of Rule 98 was adopted directly in the *Taylor* case. This allowed the Judges to evaluate the motion holistically, and dismiss claims based on individual paragraphs in the indictment. It also set a very high threshold for throwing out what the Defense maintained was "obviously" incredible evidence.[26] Although the AFRC case provided the legal basis for the Rule 98 motion in the *Taylor* case, the Rule 98 procedure changed significantly between the two cases, with a court ordered shift from lengthy written filings to exclusively oral submissions. Therefore, it is important to examine this move from written to oral proceedings, and the application of Rule 98 in the RUF case.

RULE 98 IN THE RUF CASE: NEW PROCEDURAL LIMITATIONS

In 2006, the Plenary Meeting of Judges of the Special Court amended Rule 98 yet again, creating the version of the rule that is currently in force. The most noteworthy change was the shift from written to oral submissions by the parties. The Court modeled this new mechanism after the ICTY, in an effort to speed-up the trials.[27]

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[22] The Court provided little rationale for this decision, reasoning that not only did Rule 98 withhold the power to break a count down into its particulars, but also that it would be impractical to do so. *Brima et al.*, Rule 98 Decision, ¶ 12.
[23] *Brima et al., Rule 98 Decision,* ¶ 21; *but see Norman et al.*, Decision on Motions for Judgement of Acquittal Pursuant to Rule 98, ¶ 53 (Oct. 21 2005).
[24] *Prosecutor v. Naletilić*, Case No. IT-98-34-T, Decision on Motions for Acquittal, ¶ 11 (Feb. 28, 2002).
[25] *Id.*
[26] *Prosecutor v. Bagasora et al*., Case No. ICTR 98-41-T, Decision on Motion for Judgement of Acquittal, ¶ 6 (Feb. 2 2005).
[27] The RUF Trial Chamber noted "the said provisions have been modeled on the corresponding current Rule 98*bis* of the ICTY Rules, as last amended on 8 December 2004, reading as follows: 'Noting that, according to the most recent jurisprudence of the ICTY concerning Judgements of acquittal, the adoption of an oral procedure was intended, inter alia, to expedite the process involving these motions, while not in any way diminishing a Chamber's responsibility to make a considered decisions.'" *Sesay et al*., Scheduling Order Concerning Oral Motions for Judgement of Acquittal Pursuant to Rule 98, ¶ 4 (Aug. 2, 2006) (citing *Orić*, Trial Transcript 3 June 2005, pg. 3, and *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Trial Transcripts 17 May 2005, pg. 60).

The 2006 rule was applied for the first time in the RUF case. In that case, the Court called for the parties to submit position papers on how the Rule 98 procedure should work in order to guarantee a fair and efficient process. In these submissions, both the Prosecution and Defense parties indicated that a Defense filing of an advance notice of the specific issues it intended to address in its oral submissions would promote fairness and efficiency under the rule.[28] Thus, although the rule calls exclusively for oral submissions from the parties, Trial Chamber I ordered the parties to submit "skeleton" briefs outlining the arguments they would make orally.[29]

Regrettably, the move to oral submissions has not significantly expedited the Rule 98 procedure (See Chart 1 below). Although this analysis does not account for the resources Chambers and the parties had to dedicate to Rule 98 proceedings under the various versions of the Rule, looking at the time passed between the end of the Prosecution's case, the Rule 98 proceedings, and the start of the Defense case can be indicative of general trends in efficiency. In the CDF case, the time between the close of the Prosecution's case and the Rule 98 decision was three months, with the Defense case beginning three months after the Rule 98 decision.[30] In the AFRC case, it was four months and two months, respectively.[31] In the RUF case, the first to use oral hearings, the time period between the end of the Prosecution's case and the Rule 98 decision also lasted three months. It was another six months before the start of the Defense case, longer than any other trial at the SCSL.[32]

In the *Taylor* case, the Trial Chamber did not request any skeletal arguments or other written

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[28] *Sesay et al.*, Scheduling Order Concerning Oral Motions for Judgement of Acquittal Pursuant to Rule 98, pg. 3.

[29] This practice was also applied in ICTY cases. *See, e.g., Jelisić*, Trial Transcript, Prosecution Appeal on Acquittal, 22 February 2001, pg. 37 (line 7).

[30] In the CDF and AFRC cases, the Defense teams were given three weeks from the close of the Prosecution's case to submit its Rule 98 motions; the Prosecution was given three weeks to respond. *Norman et. al*, Scheduling Order on Filing of Submissions by the Parties Should a Motion for Judgement of Acquittal be Filed by Defence, (June 2, 2005); *Brima et. al*, Scheduling Order for Filing a Motion for Judgement of Acquittal, (Sept. 30, 2005). In the CDF trial, the Defense case began on January 17, 2005, nearly three months after the Trial Chamber rendered its Rule 98 decision on October 21, 2005.

[31] *See Brima et. al*, Scheduling Order for Filing a Motion for Judgement of Acquittal. In the AFRC trial, the Rule 98 decision was given on March 31, 2006, and the Defense case started on June 5, 2006. *See Brima et. al*, Rule 98 Decision.

[32] In the RUF case, the Prosecution closed its case on August 2, 2006. The Court scheduled the Rule 98 hearings on the same day. The Defense parties submitted their skeleton arguments on September 25, nearly two months after the close of the Prosecution's case. *Sesay et. al*, Skeletal Argument for Oral Submission under Rule 98, (Sept. 25, 2006). The Prosecution followed with its skeleton submissions two weeks later, on October 6, 2006. *Sesay et. al*, Consolidated Prosecution Skeletal Response to the Rule 98 Motions by the three Accused, (Oct. 6, 2006). On October 16 – 17, 2006, the Court heard oral submissions from the parties. Each Defense team had two hours to present their arguments, and the Prosecution had three hours. The decision was rendered orally by the Trial Chamber on October 25, 2006. *Sesay et. al*, Trial Transcript, 25 October 2006. The whole process, from the close of the Prosecution's case, took nearly three months. However, two weeks of that time included the annual SCSL summer recess (August 7 – 18, 2006); in effect, the process took two and a half months. The Defense case did not start until May 2, 2007, more than six months later, and nine months from the close of the Prosecution's evidence.

materials from the parties regarding the Rule 98 motions. The entire Rule 98 process lasted two months from the conclusion of the Prosecution's case.[33]

Rule 98 Time Frame Comparisons[34]

Rule 98 Proceedings	Close of Prosecution case to Rule 98 decision	Rule 98 Decision to start of Defense case	Close of Prosecution case to start of Defense case
SCSL Cases			
Pre-2006 Amendment			
CDF	3 months	3 months	6 months
AFRC	4 months	2 months	6 months
Post- 2006 Amendment			
RUF	3 months	6 months	9 months
Taylor	2 months	~2 months	4 months
ICTY Cases			
Orić	1 week	~1 month	~1 month
Krajišnik	~1 month	2 months	3 months

Although the Rule 98 procedure in the *Taylor* case was substantially faster than the Rule 98 process in the AFRC case, and one month faster than the process in the CDF and RUF cases, it is worth noting that these motions have taken far longer at the Special Court than they have at the ad hoc tribunals. For example, cases involving Rule 98 motions from the ICTY spanned from one week to one month for the equivalent process.[35] The Defense case is scheduled to begin on July 13, 2009, about two months after the Court decided its Rule 98 motion, and four months from the Prosecution's formal case closure. Thus, the oral Rule 98 motion procedure has only

[33] This includes an annual two week spring-recess. The Prosecution finished presenting evidence on January 31, 2009, and formally closed its case on February 27, 2009, as it was waiting on decisions from the Trial Chamber regarding evidentiary issues. The Court scheduled the Defense oral submissions for April 6, 2009, just over one month after the official close of the Prosecution's case and two months after the last witness was heard. The Prosecution provided its oral submissions three days later, on April 9, 2009. The Court held its spring recess from April 10 – 24, 2009. The Court rendered its decision on May 4, 2009. *Taylor*, Trial Transcript, 4 May 2009.

[34] Data taken from available information detailed in Court Scheduling Orders and transcripts. *See* notes 32-35 *supra* and 37 *infra*.

[35] For example, in the *Orić* case, in which the Prosecution's case lasted eight months, the Rule 98*bis* process took just over one week from the end of the Prosecution's case. The Prosecution rested its case on May 31, 2005, the Rule 98*bis* decision was rendered on June 8, and the Defense case started on July 4, 2005. *Orić*, Trial Transcripts, 31 May 2005; 8 June 2005; 4 July 2005. Notably, in spite of the quick turn around on the decision, the *Orić* Rule 98*bis* decision was thorough, articulating the legal standards for all counts and modes of liability. *Orić*, Trial Transcript, 8 June 2005. In the *Krajišnik* case, where the Prosecution's case took 17 months, the Rule 98*bis* process took just under one month. This period may have been shorter, but for the ICTY summer recess. The Prosecution completed its case-in-chief on July 22, 2005, the Rule 98*bis* decision was given on August 19, 2005, and the Defense started its case on October 10, 2005. *Krajišnik*, Trial Transcripts, 22 July 2005; 19 August, 2005; 20 October 2005.

had a slight effect on speeding up the *Taylor* case.

The *Taylor* trial, more so than any other trial at the Special Court, is proceeding at a time when the SCSL is under incredible financial and time restraints. At the time of the *Taylor* Rule 98 hearings, the head Prosecutor released statements to the media that the Court was nearing bankruptcy and that Taylor could go free if the Court could not secure funding.[36] The last case before the SCSL, the *Taylor* trial is running months behind schedule. If it runs too far over schedule, the trial is in danger of losing its temporary venue in a leased ICC courtroom in the Hague.[37] Thus, there is considerable pressure to expedited proceedings where possible.

Given the multiple revisions of Rule 98 and the practical tool it provides the Court to shorten the length of trials, it appears as though Trial Chamber II lost an opportunity to streamline the Taylor trial through a short-sighted application of the rule. In this case, Trial Chamber II appears to have prioritized speedy Rule 98 proceedings over the potential benefit of spending more time to produce a thorough, reasoned Rule 98 decision that ultimately could have sped the trial further down the line. Although the change to oral submissions in Rule 98 was intended to shorten the length of those specific proceedings, haste in determining a motion for acquittal at this stage should not have prevented the Court from engaging in thorough analysis of the detailed submissions that in the long-term could have shortened the case significantly.

SUBMISSIONS IN THE TAYLOR CASE

This section of the report now turns to a detailed account of the parties' submissions in the *Taylor* case, and a discussion of the Trial Chamber's decision on the motion. Although both parties provided in-depth arguments about the legal standards to be applied and the evidence in question, the Trial Chamber limited its decision to a discussion of JCE I and did not address specific contentions of the parties. Accordingly, the Trial Chamber missed a valuable opportunity to use the Rule 98 tool in a way that might have boosted efficiency during the second half of the trial.

The Defense for Charles Taylor moved for a dismissal of each of the eleven counts charged against Taylor. Focusing its Rule 98 motion on the linkage evidence provided by the

[36] "I could have the best evidence in the world, I could have the strongest advocacy, but if we ran out of funds, the court might have to let the accused go. You can't hold them if you don't have the resources to finish the trial. I don't want that to happen," Rapp is quoted as saying in an article published by the Human Rights Tribune, "Special Court for Sierra Leone receives funding reprieve," April 15, 2009, available at http://www.humanrights-geneva.info/Special-Court-for-Sierra-Leone,4337. The near bankruptcy of the SCSL was confirmed by a Court official in an interview on March 26, 2009.

[37] The ICC is scheduled to begin several new courtroom proceedings of its own at the end of 2009, and the courtroom currently being used for the *Taylor* trial may not be available much longer.

Prosecution, the Defense stated, "we have always maintained in various fora, public private and otherwise, that terrible things happened in Sierra Leone. The citizens of the Republic of Sierra Leone faced atrocities of unimaginable proportions. We have never denied that."[38] Instead of challenging the veracity of crime-base evidence, the Defense argued that "the problem with the Taylor case from its inception has been the lack of and poor quality of the evidence linking Taylor to the alleged offences."[39] During oral arguments, Counsel for the Accused highlighted gaps in the evidentiary record, and argued that these gaps made it impossible to find the accused liable under any of the modes of liability charged—planning, instigating, ordering, committing, aiding and abetting, joint criminal enterprise, and command responsibility.

In response, the Prosecution sought dismissal of the motion in its entirety, countering that it had led evidence capable of supporting a conviction on each count in the indictment. The Prosecution maintained that the Court need only find evidence capable of supporting a conviction under *one* mode of liability.[40] Nevertheless, Counsel for the Prosecution presented arguments on all of the alleged modes of liability except committing.

STANDARD OF REVIEW

In the *Taylor* case, both parties agreed on the "capable" standard of review adopted in the AFRC case. However, they disagreed as to how and whether the Court ought to assess the credibility of evidence. As such, the parties' submissions focused heavily on the issue of evidence reliability. Working within Trial Chamber II's AFRC Rule 98 framework, the *Taylor* Defense argued that the rule should be interpreted so as to allow the Court to disregard evidence that is "obviously incredible or obviously unreliable."[41] The Defense argued that the rule gave the Court the discretion to dismiss or not consider evidence that is "completely ridiculous in many ways."[42] The Prosecution argued, on the contrary, that the standard articulated in the AFRC decision made it inappropriate to examine the credibility or reliability of the evidence at the Rule 98 stage, citing the Court's holding that "if one possible view of the facts might support a conviction the Trial Chamber cannot enter a judgment of acquittal."[43]

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[38] *Prosecutor v. Taylor*, Case No. SCSL-2003-01-T, Trial Transcript, 6 April 2009, pg. 3 (lines 24-27).
[39] *Taylor*, Trial Transcript, 6 April 2009, pg. 4 (lines 4-6).
[40] Counsel for the Prosecution argued "Individual criminal responsibility is not strictly speaking a count under the indictment so the approach the Prosecution suggest should be that as long as there is evidence which could support conviction on the basis of any one of the various modes of liability alleged no judgment of acquittal should be entered." *Taylor*, Trial Transcript, 9 April 2009, pg. 11 (lines 24-29).
[41] *Taylor*, Trial Transcript, 6 April 2009, pg. 17 (lines 17-18).
[42] *Id*. at pg. 17 (line 2).
[43] *Taylor*, Trial Transcript, 9 April 20098, pg. 11 (lines 23-29, 1-3).

In its judgment on the *Taylor* motion, the Trial Chamber applied the same legal standard as it had applied in the AFRC case, reading its holding from that decision almost verbatim. The Court noted that it had reviewed all of the Prosecution's evidence in arriving at its decision. However, it did not discuss the specifics of the parties' submissions in the *Taylor* case, nor did it clarify how it would make a determination of "obvious" credibility or reliability. The Court found that the submissions of both parties were generally consistent with the established jurisprudence of both the SCSL and the other international criminal tribunals relied on by Trial Chamber II in the AFRC case with respect to the substantive law of the counts and modes of liability.

CRIME LOCATIONS

In its only submission related to crime-base evidence, the Defense argued that the Prosecution failed to lead evidence about crimes committed in several locations in the Freetown/Western Area and Kono district. It based this argument on the fact that the record either did not include evidence pertaining to these areas at all or included evidence about locations spelled differently from the indictment.

The Prosecution asked the Court to deny this aspect of the Defense motion, as it had denied a similar argument in the AFRC Rule 98 decision. The Prosecution argued that the Trial Chamber was required to determine whether there was no evidence on the record capable of supporting a conviction on one or more counts, not to deliberate the sufficiency of evidence on the record for specific particulars of each count in each paragraph of the indictment.[44]

The Court held that under Rule 98, it is not appropriate, or desirable, to strike out the names of locations listed in the indictment that may not precisely match the names of locations in the evidence. The Court explained that given the variety of languages spoken in Sierra Leone, and the high illiteracy rate among witnesses, slightly different names may refer to the same location. Furthermore, the Trial Chamber refused to evaluate evidence over the particulars of the counts in the indictment, and thus rejected the Defense submission that no evidence was raised on certain locations mentioned in the indictment.

MODES OF LIABILITY

The Defense devoted the majority its oral argument to systematically addressing each mode of liability in the indictment. It argued that Prosecution evidence was insufficient to support conviction under any of the seven alleged modes of liability—planning, committing, instigating, ordering, aiding and abetting, JCE, and command responsibility. The Prosecution presented

[44] *Id*. at pgs. 3-4 (lines 26-29, 11); *Brima et. al*, Rule 98 Decision, ¶ 21.

counterarguments for six out of seven modes of liability. Nevertheless, as mentioned above, the Court declined to rule on all but one of these.

PLANNING

Taylor's Defense argued that planning is a mode of liability which implies that the accused, either alone or with others, contemplated the commission of a crime in both its preparatory and execution phases. Drawing attention to the conjunctive nature of this mode of liability, the Defense argued that there is no evidence linking Taylor to planning the execution phase of the crimes of which he is accused. The contribution of the accused must be substantial, the Defense argued. Furthermore, Defense Counsel maintained, the accused must have direct intent or know that there was a substantial likelihood that the crime would be committed in execution of the plan. With regard to testimony that Taylor planned the January 1999 invasion of Freetown, the Defense argued that Prosecution evidence showed his contribution to the invasion would have been minimal. The Defense pointed specifically to one witness's contradictory testimony. The witness claimed initially that Taylor and the RUF planned the invasion, but went on to say that the AFRC took the initiative in the invasion and that the RUF played a minimal role, if any, in the attack. Under the Rule 98 standard, the Defense argued, this type of evidence is not capable of supporting a conviction on the basis of "planning."

The Prosecution countered the Defense position by pointing to evidence that Taylor participated in the planning of the Fitti-Fatta attack as well as plans for other operations designed to take and hold Kono. The Prosecution asked the Court to evaluate this evidence of planning in the context of other crimes in the Kono area and in Sierra Leone in general, essentially arguing that if there is evidence that Taylor planned these actions in Kono then by extension he must be responsible for planning other crimes in other regions of Sierra Leone. The Prosecution argued that planning to take and hold the Kono area substantially contributed to the commission of crimes in that it "ensured the efficient use of resources, coordinated effort and further set the framework for the crimes that would be committed and the plan came from someone who had tremendous influence and authority over the RUF and the AFRC and RUF."[45] Evidence of direct intent, the Prosecution submitted, includes testimony that Taylor devised a plan with Bockarie in which the RUF forces were to save ammunition and make the offensive "fearful." The Prosecution argued that "fearful" meant the forces were to commit crimes against civilians. Alternatively, assuming arguendo that the plans themselves were not criminal but were plans for legitimate military offensives, the Prosecution argued that Taylor was aware of the "substantial likelihood" that crimes would be committed in carrying out those military plans, and that was enough to hold him criminally responsible, under a "planning" theory of liability, for crimes committed.

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[45] *Taylor*, Trial Transcript, 9 April 2009, pg. 47 (lines 5-8).

COMMITTING

The Defense characterized the mode of liability "committing" as involving the direct and physical perpetration of crimes by the accused. It argued that the Trial Chamber had previously defined "committing" as such. Accurately, the Defense noted that the Prosecution has not led any evidence indicating that Taylor was ever in Sierra Leone, or that he ever physically perpetrated any of the crimes in question. However, the Defense's characterization of "committing" may not be entirely accurate. In a recent ICTY judgment, Justice Shahabuddeen wrote a separate concurring opinion clarifying that the concept of JCE as a mode of liability was encompassed in the term "committing."[46] The Trial Chamber in this case could rely on this jurisprudence to support a finding that Charles Taylor "committed" the crimes in question if it finds that he participated in a JCE which involved these crimes.

The Prosecution did not submit any arguments directly in response to this Defense contention.

INSTIGATING

According to the Defense, the *actus reus* for instigating is that the accused "urged, encouraged or prompted another person to commit the offense," either expressly or impliedly through acts or omissions.[47] Furthermore, the Defense argued that the conduct of the accused must substantially contribute to the perpetration of the crimes, and have a causal effect on the commission of the crime.[48] To illustrate the inadequacy of evidence on this element, the Defense pointed to testimony that Taylor told Johnny Paul Koroma to capture Kono District. The Defense argued that this is not evidence that could prove beyond a reasonable doubt that the conversation substantially contributed to the attacks on Kono in 1998, and the crimes committed during the attacks. Addressing the *mens rea*, the Defense argued there is neither evidence that Taylor directly intended for his comments to instigate the crimes in the indictment, nor is there evidence to prove that he knew these particular crimes would result.

In its submissions, the Prosecution acknowledged that there was no facial evidence of criminal instigation. However, the Prosecution argued that the Court could construe the same evidence offered in the "Planning" submissions (with respect to attacking and holding Kono district) to convict Taylor of instigation. Counsel for the Prosecution argued that there was a causal link between Taylor's prompting and the commission of a crime, and that there is evidence to support

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[46] *Krajišnik*, Appeals Judgement, ¶ 11 (Mar. 17, 2008) (Shahabuddeen, J., separate opinion).
[47] *Taylor,* Trial Transcript, 6 April 2009, pg. 16 (lines 17-18).
[48] *Prosecutor v. Fofana et al.*, Case No. SCSL-04-14-A, Appeals Chamber Judgement, ¶ 54 (May 28, 2009); Judgement; *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgement, ¶ 515 (Nov. 30, 2005); *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgement, ¶ 269 (Sept. 1, 2004); *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A, Judgement, ¶ 30 (June 7, 2005).

a finding that Taylor's instigation was a factor clearly contributing to the conduct of the RUF. The Prosecution supported this contention by pointing to evidence of Taylor's influence over the RUF and the RUF leadership, including evidence that he was considered the "father" of the RUF. This, the Prosecution submitted, was sufficient for a finding of instigation. The Prosecution asked the Court to consider circumstantial evidence that Taylor directly intended to instigate the crimes alleged; in the alternative, it submitted, he knew that there was a substantial likelihood that they would be committed as a result of his instigation.

ORDERING

The Defense submitted that the mode of liability "ordering" involves "a person in a position of authority ordering another in a subordinate position to commit an offence."[49] The Defense argued that the Prosecution must also prove that Taylor not only had the *mens rea* for ordering, but also that he had the *mens rea* for the underlying crime, and that he foresaw the possibility of the crime being committed as a result of his orders. Although the Defense acknowledged that there is evidence in the record that is "similar" to ordering, it argued that essential elements of the mode of liability are missing. Specifically, regarding evidence that Taylor ordered Sankoh to go to the Ivory Coast, the Defense argued that it was not clearly proven that Sankoh was subordinate to Taylor when the witness claims the "order" was given. Similarly, the Defense argued that evidence of Taylor "ordering" artillery to be sent to the RUF, thus facilitating the crimes of the RUF, refers to incidents outside of the temporal jurisdiction of the Special Court, and therefore fails as proof of that mode of liability.

The Prosecution submitted that there was ample evidence to support its contention that Taylor ordered the RUF and AFRC to commit the crimes in the indictment. The Prosecution argued that Taylor was in a position of authority over the group, pointing to evidence of the relationship between Taylor and Sankoh in the late 1980s in Libya where they allegedly met and trained together at a revolutionary training camp. The Prosecution also argued that evidence of Taylor's leadership of the NPFL supports a finding that he was a leader of the RUF/AFRC. The Prosecution referred to testimony that Sankoh ordered Bockarie to take instructions from Taylor after Sankoh was arrested, and that all senior RUF members referred to Taylor as "chief." Based on this position of authority, the Prosecution argued that "judgments from the ICTY indicate that using that position to convince or persuade another to commit an offence would also be an instance of ordering when it comes from a person in a position of superior authority."[50] Moreover, Counsel for the Prosecution submitted that the accused need not be the immediate superior of the perpetrator, and that the order can be explicit or implicit. The Prosecution again

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[49] *Taylor,* Trial Transcript, 6 April 2009, pg. 16 (lines 7-9).
[50] *Id*. at pg. 53 (lines 4-7).

referred the Court to the same testimony about Taylor ordering the RUF to take and hold Kono. Counsel further cited evidence that Taylor ordered Bockarie to build an airstrip in Kono, suggesting that civilians do the work. The Prosecution suggested that these and other orders were criminal in nature, thus on their face demonstrate the requisite criminal intent; alternatively, they repeated the argument that circumstances demonstrate Taylor was aware of the substantial likelihood that crimes would result from his orders.

AIDING AND ABETTING

Addressing the *actus reus* of aiding and abetting, the Defense's arguments turned on the requirement that the accused's acts or omissions had a substantial effect on the perpetration of the crimes. The Defense also argued that under the SCSL Appeals Chamber decision in the CDF case, "words of moral support and encouragement to fighters about to go on military operations, or blessings, an affirmation or confirmation that their actions are appropriate, or the provision of medicine which the soldiers believe might protect them, does not constitute aiding and abetting."[51] The Defense also drew a distinction between ICTY case law and SCSL case law, arguing that under the SCSL jurisprudence, an aider and abettor is required to aid a specific incidence of a crime. Thus, Counsel for the Accused argued, behind each piece of evidence that may suggest Taylor assisted in the commission of crimes, there must be evidence that supports the finding that he aided a specific incident of a specific crime. According to the Defense, there is no such evidence on the record.

To support this line of argument, the Defense walked the Court through several instances of testimony that were seemingly contradictory, outside the temporal jurisdiction of the SCSL or which did not clearly prove that the actions of Taylor had a substantial effect on the perpetration of the alleged crimes. For example, regarding evidence that Taylor sold arms and ammunition to Sam Bockarie, the Defense argued that the Prosecution had failed to provide vital evidence that any such sale had a substantial effect on the commission of a specific crime that is punishable under the SCSL Statute. The Defense further submitted that there was no evidence that Taylor had the appropriate *mens rea* to specifically assist in the commission of a particular crime when selling this arms and ammunition. The Defense argued that the record is replete with this type of incomplete evidence that fails to support a conviction on the basis of aiding and abetting.

Finally, the Defense argued that the Prosecution was required to prove that Taylor was aware of the perpetrator's state of mind when providing assistance. It asked the Court to question whether there was adequate evidence to prove the *mens rea* of the direct perpetrators, and, further, evidence that Taylor had knowledge of the perpetrator's mental state.

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[51] *Id*. at pg. 33 (lines 7-11).

The Prosecution replied that there was sufficient evidence to demonstrate that Taylor had provided practical assistance to the RUF in committing the alleged crimes, but focused its arguments more specifically on encouragement or support, acts which can sustain a conviction for aiding and abetting. Like the Defense, the Prosecution based its arguments on the Appeals Chamber judgment in the CDF case. However, the Prosecution pointed to a holding where the Court upheld a conviction of aiding and abetting based on words of encouragement, whereas the Defense cited an instance where acquittal was upheld for the same issue.[52]

The Prosecution also cited ICTY case law in support of aiding and abetting convictions based on "a commander permitting the use of resources under his or her control including personnel to facilitate the perpetration of a crime."[53] Relying upon the ICTY appeal judgment in the *Blaskić* case, the Prosecution argued that it is not necessary to prove that the actions of Taylor caused the crimes to be committed or that they were condition precedent to the commission of crimes. It is worth noting, however, that causation and substantial effect are distinct concepts, and thus the Prosecution's submissions on this issue do not directly refute the Defense's contention.

Turning to the *mens rea* for aiding and abetting, the Prosecution referred to the AFRC Appeals Chamber judgment holding that the standard is whether "the accused either knew the acts would assist the commission of the crime or was aware of the substantial likelihood his acts would assist the commission of the crime."[54] The accused need not know of the precise crime committed, as long as he was aware that "one of the crimes would probably be committed, including the one actually committed."[55] The Prosecution argued that the evidence it discussed in relation to Taylor's intent and knowledge of the crimes was also sufficient to support the existence of this element.

In its ruling on the motion for acquittal, the Court did provide a general discussion of applicable law for the various modes of liability, including aiding and abetting. In that discussion, it held that "it is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of

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[52] *Fofana et al.*, Appeals Chamber Judgement, ¶¶ 78-80, 109-10. In that case, the accused Kondewa had given his blessing and a speech at CDF military parade. The court found that this speech substantially contributed to the crimes committed in Tongo Field by CDF forces. The Appeals Chamber thus upheld both a conviction for aiding and abetting by providing words of encouragement for crimes in Tongo and an acquittal on the same issue for crimes committed in Bo District. The holding turned on the nature of the speeches and words said by Kondewa. If the Trial Chamber ultimately addresses the issue in the *Taylor* case, it will have to reconcile this difference relying on the specific facts adduced in the *Taylor* trial.

[53] *Taylor,* Trial Transcript, 6 April 2009, pg. 44 (lines 1-3) (citing *Prosecutor v. Krstić* Appeals Judgement, ¶ 137-8, 144 (April 19, 2009); and *Prosecutor v. Blagojević*, Case No. IT-02-60-A, Appeals Judgement, ¶ 127 (May 9, 2007)).

[54] *Fofana et al.*, Appeals Chamber Judgement, ¶¶ 78-80, 109-10 (May 28, 2009).

[55] *Taylor,* Trial Transcript, 6 April 2009, pg. 44 (lines 25-26).

crimes would probably be committed including the one actually committed."[56] The Court did not mention the issue of aiding and abetting through words of encouragement, or the issue of substantial effect. Moreover, the Court declined to address the substantive merits of the evidence as applied in the *Taylor* case.

JOINT CRIMINAL ENTERPRISE

The Defense began its JCE submissions by arguing that because all of the crimes alleged in the indictment occurred in Sierra Leone, evidence of crimes occurring in Liberia had no bearing on the case. Accordingly, the Defense focused its discussion of JCE on crimes occurring in Sierra Leone that may have been committed in furtherance of a joint criminal enterprise.

Reviewing the law of JCE, the Defense stipulated for purposes of argument that the first and third categories of JCE apply to the *Taylor* trial, as pled in paragraph 33 of the indictment. Citing the ICTY *Tadić* decision, Counsel for the Accused argued that the *mens rea* for JCE I requires that the co-perpetrators have a shared intent to commit the crime, and that one or more of the persons commits the crime with the requisite *mens rea* of that particular crime. Thus, Counsel submitted, the Prosecution must show that Taylor intended to take part in a joint criminal enterprise and further a criminal purpose, individually or with others. For JCE III, the Defense argued that "the possible commission [of crimes] by other members of the group … that do not constitute the object of the criminal purpose" must be foreseeable, and that the Prosecution must show that Taylor willingly took the risk that a foreseeable crime might occur as a result of the joint criminal enterprise.[57]

The Defense next set out to define what the Prosecution claims was the common purpose of the alleged JCE. Going through the Prosecution's opening statement and case summary, the Defense noted inconsistencies in the Prosecution's argument. The Prosecution's opening statement, it contended, argued that the common criminal purpose was to take political and physical control of Sierra Leone, exploit its natural resources, and install a friendly or subordinate government there to facilitate that exploitation. The case summary, according to the Defense, argues that there were two common purposes: 1) that in the late 1980s, Foday Sankoh and Taylor entered into a common plan to assist each other in taking power in their respective countries, and 2) that between 1988 and 2002 Taylor and others participated in a common plan to

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[56] *Taylor,* Trial Transcript, 4 May 2009, pgs. 9-10 (lines 26-29, 1).

[57] *Taylor*, Trial Transcript, 6 April 2009, pg. 39 (lines 2-10). The Defense draws and important distinction on the crimes that must be foreseeable, because the Prosecution has argued that the object of the criminal purpose involved "terrorizing the population" and "pillag[ing]" the natural resources of Sierra Leone. Therefore, all crimes that the Prosecution has argued constitute the aim of terrorizing and pillaging the population cannot be considered the "foreseeable" crimes under JCE III. This would limit Taylor's culpability for these crimes to a conviction based on JCE I. *Id*. at pgs. 39-40 (lines 13-20, 1-3).

carry out a criminal campaign of terror to pillage the diamonds and other resources of Sierra Leone and forcibly control Sierra Leone's population and territory. Assuming for the sake of argument that the common plan involved taking power in Sierra Leone, depleting its resources, and installing a friendly government, the Defense argued that these activities are not crimes within the SCSL statute.[58]

Furthermore, it questioned the time period of the JCE, noting that the temporal jurisdiction of the SCSL is limited to crimes occurring between November 30, 1996 and January 18, 2002. The Defense also noted that the JCE as alleged by the Prosecution was static; that the common plan that supposedly spanned fourteen years from 1988 to 2002 did not change. Thus, it argued, the evidence must demonstrate that this common plan was the same throughout the life of the JCE.

The Defense argued that under JCE I, the Prosecution must show that Taylor had the same mental state and intent to commit specific crimes as all other co-perpetrators. Going through the evidence on record, the Defense argued that there was no evidence that Taylor had a "meeting of the minds" with Bockarie or Sesay amounting to the same common purpose that supposedly existed between Taylor and Sankoh. Furthermore, it argued that Taylor did not share the same intent as the leaders of the AFRC during the January 1999 Freetown invasion. According to the Defense, there is evidence on the record indicating that during this attack the AFRC was acting in its own interests to re-establish the Sierra Leone Army. It also argued that the *mens rea* for terrorizing the civilian population was to act with the specific aim of spreading fear. The Defense argued that the purpose for criminal acts of the various members of the alleged JCE spanned becoming the president of Sierra Leone to reinstating the power of the SLA, not spreading fear in the civilian population. The Defense concluded its JCE arguments by asking the Trial Chamber to evaluate whether the evidence on record demonstrates that Taylor acted with a shared intent to spread fear through the population, as the means or purpose of the JCE.

In response, the Prosecution argued that, "virtually all the evidence in this case is relevant to the existence of a JCE as a form of liability in this case."[59] The Prosecution maintained that the common plan between Taylor and others amounted to "a criminal means of a campaign of terror,

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[58] This argument has been the basis for motions on the pleading of JCE at the SCSL. *See Taylor,* Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE (Feb. 27 2009) (Lussick, J., dissenting). Although the Appeals Chamber held that as long as acts contemplated as a means of achieving the common purpose were crimes under the statute, it did not matter that the common purpose itself was not a crime. *Brima et al.*, Appeals Judgement, ¶ 84 (Feb. 22, 2008). However, this holding on pleading standards for JCE would not preclude the Trial Chamber from holding that in its application of JCE the common purpose must be criminal. *Taylor*, Trial Transcript, 6 April 2009, pg. 43 (lines 6-10).
[59] *Taylor,* Trial Transcript, 9 April 2009, pg. 13 (lines 4-6).

encompassing multiple crimes to forcibly control the territory and population of Sierra Leone and pillage the natural resources, in particular diamonds."[60]

The Prosecution specifically addressed the issue of *mens rea* for terrorizing the civilian population, which a recent decision by a majority in Trial Chamber II characterized as the common plan pled by the Prosecution.[61] Counsel for the Prosecution drew a distinction between the "primary purpose" and "motivation" for a crime. She argued that in order to establish that the primary purpose of committing acts of terror was to spread terror, including extreme fear, the Trial Chamber could look to evidence outside the temporal and physical jurisdiction of the Court. Counsel also asked the Court to look at circumstantial evidence, citing testimony of victims being forced to watch or participate while violent crimes were carried out against their loved ones. The Prosecution suggested that this type of evidence demonstrates that the primary purpose of the crimes committed was to terrorize the civilian population. The Prosecution bolstered its arguments by referring to other evidence on the record about RUF soldiers mutilating and amputating victims and expert testimony claiming that the RUF used these and other brutal tactics to inspire fear in the civilian population. The Prosecution further pointed to testimony that suggested Taylor was complicit in, or knew about, this primary purpose. The Prosecution's distinction between motive and purpose refutes the Defense proposition that the intent of the various members of the JCE was not to terrorize the civilian population but rather diverged into several other political intentions.

Counsel for the Prosecution called the Court's attention to evidence on the record pertaining to each element of this common plan, and the criminal means by which Taylor allegedly achieved it. The Prosecution argued that the efforts to forcibly control the population of Sierra Leone began as an agreement between Sankoh and Taylor, and continued through junta period and afterwards. Significantly, the Prosecution argued that the January 1999 attack on Freetown was a "dramatic" manifestation of this effort to forcibly control the population of Sierra Leone, maintaining that the motivation that inspired particular individuals to participate in the attack was irrelevant.[62] The Prosecution argued that there was substantial evidence on the record demonstrating that this control over the local population facilitated the pillage of Sierra Leone's diamonds. Noting that pillaging is a crime under Article 3(f) of the statute, the Prosecution referred the Court to various examples of witness testimony about the delivery of diamonds to Taylor on behalf of the RUF leadership.

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[60] *Taylor,* Trial Transcript, 9 April 2009, pg. 14 (lines 22-25).
[61] *Taylor*, Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, ¶ 71 (Feb. 27, 2009) (Lussick, J., dissenting).
[62] *Taylor,* Trial Transcript, 9 April 2009, pg. 15 (lines 19-26).

Addressing the issue of a plurality of persons participating in the JCE, the Prosecution focused its arguments on evidence tending to demonstrate that the AFRC was a part of the JCE before, during, and after the junta. Regarding the much contested relationship between the AFRC and RUF during the January 1999 Freetown invasion, the Prosecution argued that there was ample evidence to support the finding that the RUF was indeed involved in the invasion and that the AFRC was still a member of the JCE at this time.[63] The Prosecution recalled testimony that 200 RUF soldiers were dispatched to Freetown to join the invading forces, but that these soldiers retreated before finally reaching the city. The Prosecution also pointed to testimony that RUF soldiers, on orders from Bockarie and Sesay, were engaged in efforts to fight their way into the city, and were indeed fighting alongside AFRC soldiers in Freetown. Even if it were not true that RUF soldiers were physically in Freetown, the Prosecution maintained that evidence shows the alliance between the AFRC and RUF continued at this point in time. Significantly, the Prosecution also referenced testimony in which a witness claimed he and other members of an AFRC delegation were at a meeting with Taylor, held at Taylor's request, in which Taylor said he had been helping both the AFRC and the RUF, and that he wanted them to end the division between them so as to put both parties in power in Sierra Leone. According to the testimony, Taylor told these AFRC soldiers that he had sent SLA soldiers who had been in Liberia to Bockarie to help with the January 1999 Freetown invasion.

Moving to participation, the Prosecution argued that the law does not require proving that Taylor participated in the JCE by committing a specific crime, but that proof of assistance or contribution to the execution of the common plan is sufficient. The Prosecution agreed with Defense submissions that the significance of the contribution is relevant to demonstrating that the accused shared the intent to pursue the common purpose. However, relying on the ICTY *Kvočka* decision, Counsel argued that Taylor's involvement need not amount to a "significant contribution." The Prosecution also argued that, under the recent ICTY *Martić* judgment, leaders of political bodies involved in a JCE can be held responsible for crimes committed in furtherance of the JCE by forces under their control. Therefore, the Prosecution contended, evidence that forces under Taylor's direct control were involved in the commission of specific crimes in Sierra Leone would support a finding that he is responsible for the commission of crimes under the JCE mode of liability. Specifically, the Prosecution discussed a large body of evidence that it claimed demonstrates that Taylor participated in the JCE by assisting the RUF and AFRC with arms, ammunition, materiel, NPFL fighters, and communications equipment, operators, and training. The Prosecution argued that Taylor participated by providing advice, encouragement and moral support, citing testimony of conversations between Taylor and RUF

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[63] *Taylor,* Trial Transcript, 9 April 2009, pg. 13, 15 (lines 7-16, 12-18). This is a critical point for the Prosecution to prove. The Trial Chamber Judgement in the RUF case held that the JCE between the RUF and AFRC had ended before the Freetown invasion. *Sesay et al.*, Judgement, ¶ 1503 (Mar. 2, 2009).

leadership about RUF strategy. Furthermore, the Prosecution contended, Taylor participated in the JCE by providing diamond mining equipment and assistance.

Finally, the Prosecution argued that the record shows manifestations of Taylor's intent to commit the crimes and intent to participate in the JCE, as required for JCE I. In this regard, the Prosecution referred to its discussion on demonstrated intent to commit acts of terror, and pointed to evidence that Taylor had said over the BBC that Sierra Leone would "taste the bitterness of war."[64] This, it claimed, together with evidence suggesting that Taylor had ordered the killing of Sierra Leoneans and NPFL massacres of civilians in Liberia, shows that Taylor had the requisite intent for the alleged crimes to be carried out on civilians within Sierra Leone. The Prosecution also pointed to evidence on the record that Taylor knew about atrocities being committed against civilians in Sierra Leone, and failed to prevent or punish such acts, thus demonstrating his direct intent for these crimes to be committed. In the alternative, the Prosecution suggested that this and other evidence was sufficient to prove liability under JCE III. Counsel argued that Taylor intended to participate in and further the JCE, and knew that the crimes alleged were a reasonably foreseeable consequence of the JCE. Specifically, the Prosecution argued that the evidence demonstrates that Taylor knew about the crimes vis-à-vis reports from commanders, news and media sources, and reports from the UN and other human rights groups.

COMMAND OR SUPERIOR RESPONSIBILITY

Regarding the mode of liability under Article 6(3) of the Statute of the Special Court—command or superior responsibility—the Defense limited its arguments to the issue of effective control. It maintained that there is no evidence on the record that Taylor, as a civilian, exercised *de facto* control with the trappings of *de jure* control. Defining "effective control" as having the ability to prevent or punish criminal conduct, the Defense submitted that the Prosecution had not led evidence to support the finding that Taylor had this ability, nor that he was aware of each of the specific offenses alleged in the indictment.

The Prosecution's discussion of effective control focused on evidence that Taylor's orders and suggestions were always followed. Furthermore, the Prosecution submitted that Taylor severely punished those who did not obey his orders. Significantly, the Prosecution suggested that Taylor was invited to participate in peace talks and intervene with the RUF specifically because it was known that Taylor was the one who controlled the RUF. The Prosecution further submitted that it was not necessary that Taylor have specific information about crimes committed by his subordinates, but that general information about general unlawful acts would be sufficient to

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[64] *Taylor,* Trial Transcript, 9 April 2009, pg. 38 (line 17).

prove the notice element of command responsibility. What is more, the Prosecution submitted that Taylor "was the ultimate superior and that all of the powers lay with him, and if at some point he shared those powers with Foday Sankoh … that concurrent authority does not relieve him of responsibility."[65]

DECISION OF THE COURT

The Court agreed with the Prosecution's submission that it was not necessary to evaluate the sufficiency of evidence for each mode of liability. The Court held that under Rule 98, if there is sufficient evidence capable of sustaining a conviction of just one mode of liability, then it need not evaluate the sufficiency of evidence concerning they others.[66] The Trial Chamber accordingly limited its discussion to the joint criminal enterprise mode of liability, which both parties had emphasized in oral submissions, and which the Prosecution argued could support all eleven counts.

Recalling its February 27, 2009 decision finding that JCE had been sufficiently pled in the Second Amended Indictment, the Trial Chamber reiterated its understanding of the alleged common plan: Taylor participated, "with others, namely members of the RUF, AFRC, RUF/AFRC junta or alliance and/or Liberian fighters, in a campaign to terrorise the civilian population of Sierra Leone between 30 November 1996 and 18 January 2002 and that the crimes charged in the indictment were part of a campaign of terror, or were a reasonably foreseeable consequence thereof."[67] With respect to each of the particular elements of JCE (the existence of a common plan, a plurality of persons, the participation of the accused, and the requisite *mens*

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[65] *Id*. at pg. 60 (lines 2-6).

[66] *Taylor,* Trial Transcript, 4 May 2009, pg. 14 (lines 26-9, 1). The Court's holding is at odds with the approach taken by an ICTY trial chamber in *Brđanin*. In *Brđanin*, the Chamber held: "Although the Defence, solely for the purposes of the Rule 98*bis* exercise, does not specifically challenge the evidence in relation to the modes of liability under Article 7(1) of the Statute other than 'committing' in the context of JCE, the Trial Chamber has examined the evidence in relation to each individual mode of liability for which the Accused is charged." In addition to committing in the context of JCE, the Chamber examined the Defense Motion with respect to other modes of liability: planning, instigating, ordering, or otherwise aiding and abetting in the planning, perpetration or execution of the crimes charged in the Indictment. *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98*bis*, ¶¶ 33-37 (Nov. 28, 2003). More recently, however, at least one ICTY trial chamber has ruled similarly to the *Taylor* Court. Approximately one month before the *Taylor* Court's holding on Rule 98, the Chamber in *Prosecutor v. Gotovina et al.* delivered in its oral decision following hearings pursuant to Rule98*bis*: "Having thus found, under Rule 98*bis* standard of review, sufficient evidence to sustain all counts of the indictment for each of the accused under one mode of liability, the Chamber does not, at present, need to examine the other modes of liability alleged in the indictment. In conclusion, all three accused have a case to answer on all nine counts of the indictment." *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Rule 98*bis* Hearing, pg. 27, lines 9-13 (Apr. 3, 2009). Unfortunately, like the Court in *Taylor*, the Court in *Gotovina* does not explain its reasoning in determining that sufficient evidence for all counts under one mode of liability precludes an examination of other modes of liability alleged in the indictment.

[67] *Taylor,* Trial Transcript, 4 May 2009, pgs. 15-6 (lines 25-9, 1).

rea), the Trial Chamber declared that it was satisfied that there was sufficient Prosecution evidence for each element to support a conviction on the basis of JCE.

The Trial Chamber focused its inquiry on the issue of terrorizing the civilian population, and did not address the particulars of the alleged crimes. It relied primarily on evidence that Taylor and Bockarie agreed to make operations "fearful," and that Taylor was involved in the planning of Operation No Living Thing, a particularly brutal campaign in the Kono District in 1998.[68] "During these operations, crimes set out in the indictment were summarily committed against the civilian population," the Chamber stated conclusively.[69] The Court also held that the Prosecution has adduced evidence that the common plan existed before the indictment period, noting testimony that Taylor was involved in a plan to terrorize civilians in Sierra Rutile in 1994 so that the RUF could take control of the area, and evidence that alleged Taylor had approved Sankoh's plan to terrorize civilians to keep them from voting in 1996.

The Trial Chamber announced that it was satisfied by evidence that Taylor shared a common purpose to terrorize with all of the other alleged members of the JCE. The Chamber cited evidence that the RUF leaders had ordered their offensives to be "fearsome," concluded that atrocities were committed during the campaign to terrorize the population, and stated that children were used to amputate civilians and actively participate in the hostilities. The Court further concluded that there was sufficient evidence to support a finding that there was a plurality of persons involved in the JCE, citing the testimony of several different witnesses.[70] This plurality included the RUF, AFRC, AFRC/RUF junta, Liberian fighters, and other individuals as alleged by the Prosecution in the second amended indictment.

As for the participation element of JCE, the Chamber found that there was evidence that Taylor had participated in the JCE by providing "arms, ammunition, financial assistance, manpower and other supplies"; "safe havens" to other members of the JCE, "moral encouragement and military advice"; that he facilitated "the export of diamonds in return for arms, [and] … communication between the various members of the joint criminal enterprise"; and finally that he "had persons who he believed endangered the common purpose killed."[71]

Turning to the *mens rea* requirement for joint criminal enterprise, the Court held that the Prosecution had introduced evidence capable of supporting a finding that Taylor intended to participate in the JCE, the requirement for JCE I. The Chamber found that the evidence indicated Taylor may have had specific intent to terrorize the population in the pre-indictment

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[68] *Id*. at pg. 16 (lines 14).
[69] *Id*. at pg. 16 (lines 16-8).
[70] *Id*. at pg. 17 (lines 14-29, 1).
[71] *Id*. at pg. 18 (lines 2-13).

period, citing evidence that Sankoh and Taylor agreed to help each other capture both Liberia and Sierra Leone in the early 1990s.[72] In the opinion of the Court, Taylor maintained this intent during the indictment period. The Trial Chamber again relied heavily on evidence of Bockarie agreeing with Taylor to make operations "fearful," and on evidence of Taylor's alleged role in planning Operation No Living Thing.[73] The Court found there was evidence that others participating in the JCE had committed the crimes in the indictment with the primary purpose of terrorizing the population, and that Taylor was aware of that intent.[74] Furthermore, the Court concluded, based on evidence that Taylor regularly listened to the BBC and that the BBC had reported a number of times on atrocities in Sierra Leone, that Taylor must have known about the nature of the attacks being carried out.[75] This supports the finding that Taylor shared the criminal intent with the persons who actually committed the crimes alleged, another element of the *mens rea* of JCE I.

The Trial Chamber did not address JCE III. It subsequently dismissed the Defense motion in its entirety.

CONCLUSION

The Rule 98 procedure in the Taylor case was completed in a relatively short time frame and according to accepted standards of law. It was disappointing, however, that Trial Chamber II offered only a narrow holding on the issue of JCE I, and within that holding, limited its discussion of evidence to a few particular examples. The ICTY's *Manual of Best Practices* states that "using the motion for acquittal at the end of the Prosecution's case to refine the remaining case against an accused has clear advantages."[76] With its narrow discussion and lack of explanation of contentious legal issues, the Trial Chamber lost the opportunity to refine the Taylor Defense case.

Although the Trial Chamber's limited approach was likely seen as the most efficient manner to address a Rule 98 proceeding, and thus necessary in light of the financial and time constraints faced by the SCSL, it also begs the question of whether the SCSL is compromising judicial quality in its efforts to be timely and cost efficient. In the AFRC case, the same Trial Chamber rendered a 104 page Rule 98 decision discussing the law and arguments for each count and each

[72] *Id*. at pgs. 18-9 (lines 26-29, 1-10).
[73] *Id*. at pg. 19 (lines 11-7).
[74] *Id*. at pg. 19 (lines 18-28).
[75] *Id*. at pgs. 19-20 (lines 1-6).
[76] ICTY MANUAL ON DEVELOPED PRACTICES, *supra* note 2, 87. This is the first manual of its kind, and unique to the ICTY.

mode of liability at issue.[77] The move to oral submissions in the Rule 98 procedure does not mean that the level of detail and analysis in the Chamber's decision need to be any less thorough or robust than it was in written proceedings. Trial Chamber I explicitly addressed this concern in the RUF case, noting that at the ICTY, "the adoption of an oral procedure was intended … to expedite the process involving these motions, while not in any way diminishing a Chamber's responsibility to make a considered decisions."[78] Indeed, according to the ICTY *Manual of Best Practices*, "for a Chamber to rule on a motion for acquittal after the conclusion of the Prosecution's case, it must be clear on the legal elements of the crimes and/or modes of liability at issue. Consequently, the legal sections of the draft judgment must be sufficiently advanced to allow the Chamber to render its decision."[79] Assuming that the Trial Chamber in the Taylor case is indeed clear on the legal elements of the crimes and modes of liability, and that these portions of the judgment are drafted, it would have been beneficial for all parties to hear its preliminary findings on these matters, and should not have taken significantly more time to render a decision.

Ultimately, it is not at all clear that the approach taken by Trial Chamber II was actually more efficient. As discussed above, there is no significant difference between the length of Rule 98 proceedings in Taylor and prior SCSL cases.[80] While it is true that the proceedings took half the time as they did in the AFRC case, the AFRC decision was significantly more detailed and rich in legal reasoning. Indeed, some may argue that it is inefficient and a waste of resources to engage in a procedure in which parties take several weeks to craft detailed, comprehensive arguments about the alleged crimes and the quality of the evidence, only to be met with a cursory decision from the Bench. The Chamber could have used the opportunity of a Rule 98 hearing in a more pro-active way to shape the remaining case against Taylor. If it was hesitant to take the time needed to craft a thorough Rule 98 decision, the Court could have limited the scope of the Rule 98 procedure in a scheduling order after hearing the parties' intended arguments, similar to Trial Chamber I in the RUF case. After hearing the Prosecution's submission that JCE was all-encompassing at that stage, the Court could have limited the scope of oral submissions to the issue of JCE only, if indeed it felt that was the only mode of liability worth addressing in the Rule 98 decision.

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[77] *Brima et al.,* Rule 98 Decision.
[78] *Sesay et al*., Scheduling Order Concerning Oral Motions for Judgement of Acquittal Pursuant to Rule 98, ¶ 4.
[79] ICTY MANUAL ON DEVELOPED PRACTICES, *supra* note 2, 21.
[80] It is true that the proceedings could have possibly been concluded earlier, if the Trial Chamber had not had to wait for a decision from the Appeals Chamber on the pleading of JCE in order to decide the issues raised in the Rule 98 motion. This Appeals decision was posted on May 1, 2009, a few days before the Trial Chamber gave its oral decision. *See Taylor*, Decision on "Defence notice of appeal and submissions regarding the majority decision concerning the pleading of JCE in the second amended indictment," (May 1, 2009). However, placing responsibility on the Appeals Chamber for any delay this may have caused must be considered in light of the fact that the Trial Chamber took nearly a year to decide on the original motion challenging the pleading of JCE in the *Taylor* case.

What is more, had the Trial Chamber addressed the particulars of the parties' arguments, it could have helped the Defense limit and pare down its case. The Defense case was originally estimated to last some four to six months. Current speculation is that the second half of the case will now last six to nine months, or longer.[81] Although this extension is likely the result of multiple factors, not just the results of the Rule 98 decision, any actions the Trial Chamber could take to help the Defense narrow the scope of its case would ultimately reduce the time at trial and the cost of the Tribunal. Understanding how the Trial Chamber views the relevant law involved in the trial would be one such way the Defense could more accurately tailor its case. For example, if the Court had found that there was insufficient evidence to convict on the basis of aiding and abetting or command responsibility, the Defense would not have to lead evidence on these issues. Although Rule 98 governs acquittal on the basis of counts of the indictment, Trial Chamber II itself has previously used the Rule 98 motion to evaluate the sufficiency of evidence in relation to modes of liability. It should have done so in the *Taylor* case as well.

[81] The Defense recently submitted a list of over 220 witnesses with estimated time limits for direct examination. The Prosecution estimates that according to this witness list, the Defense case will take between one year and four months and two years. *Taylor,* Trial Transcript, 8 June 2009, pg. 4 (lines 1-6).

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